

**A PENDAFTAR HAKMILIK NEGERI SELANGOR v. CAESIUS
DEVELOPMENT SDN BHD & ORS AND ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
ABDUL RAHMAN SEBLI JCA

B ZALEHA YUSOF JCA
[CIVIL APPEALS NO: B-01(NCVC)(W)-326-09-2017 &
B-01(NCVC)(W)-359-08-2017]
8 JANUARY 2020

C *LAND LAW:* Transfer – Fraud – Claim for damages by land owner – Change of name in register of title for land – Computerised issue document of title ('IDT') issued to fraudster even though land owner in possession of manual IDT – Fraudster sold land to third parties after fraudulently changing name in register – Whether change of name made through fraudulent means – Whether change of name valid and enforceable – Whether third parties had indefeasible title to land – Whether third parties subsequent/immediate purchasers – Whether land office negligent in issuing computerised IDT to fraudster – National Land Code, ss. 340 & 378

D *TORT:* Negligence – Land matter – Land office changed name in register of title for land – Computerised issue document of title ('IDT') issued to fraudster even though land owner in possession of manual IDT – Fraudster sold land to third parties after fraudulently changing name in register – Whether change of name valid and enforceable – Whether land office had duty of care towards land owner – Whether there was breach of statutory duty of care – Whether third parties entitled to claim for indemnity from land office for losses suffered in purchasing land – Whether third parties proved losses – Whether land office negligent

E *LIMITATION:* Cause of action – Land matter – Land office changed name in register of title for land – Computerised issue document of title ('IDT') issued to fraudster even though land owner in possession of manual IDT at all times – Fraudster sold land to third parties after fraudulently changing name in register – Land owner commenced action four years after change of name took place – When accrual of action commenced – Whether when change of name took place or when land owner discovered about change of name – Whether action filed within stipulated time – Whether action caught by limitation – Public Authorities Protection Act 1948, s. 2(a)

F As the owner of a piece of land, Caesius Development Sdn Bhd ('plaintiff') had, in its possession at all times, the manual issue document of title ('IDT') of the said land. However, in 2012, the plaintiff's directors discovered that there was (i) a change of name in the register of title for the land, from the plaintiff's name to the name of Spec Development & Construction Sdn Bhd ('third defendant') ('change of name'); and (ii) a registration of transfer from the third defendant to one Chua and one Tan ('the first and second defendants'). It transpired that a new computerised IDT was also issued to the first and second defendants. Following a complaint with the land office

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by the plaintiff, Registrar and private caveats were lodged. An inquiry conducted by the land office failed to resolve the issue of the ownership of the land between the parties. This prompted the plaintiff to claim for damages, at the High Court, against the first to third defendants, the directors of the third defendant (the fourth to sixth defendants) and the Pendaftar Hak Milik Negeri Selangor ('seventh defendant'), on the grounds that (i) the plaintiff was the true and sole registered owner of the land; (ii) the change of name was fraudulently made and therefore, null and void; (iii) the transfer of the land and the issuance of the computerised IDT to the first and second defendants were null and void; and (iv) the first and second defendants' title to the land was defeasible under s. 340(2) of the National Land Code ('NLC') and they were not *bona fide* purchasers for valuable consideration and, therefore, could not be protected by the proviso to s. 340(3) of the NLC. The plaintiff also claimed against the seventh defendant for negligence and breach of statutory duty. Objecting to the plaintiff's claim, (i) the first and second defendants submitted that (a) they were *bona fide* purchasers for value without any notice or knowledge of any defects in the title to the land; (b) they were the lawful owners of the land where the computerised IDT was issued in their favour; and (c) if the plaintiff succeeds in its claim at the conclusion of the trial, the first and second defendants claimed contribution and indemnity from the third, fourth, fifth, sixth and/or seventh defendants; and (ii) the seventh defendant (a) denied any negligence and breach of statutory duty in respect of the change of name and issuance of the computerised IDT; (b) the first and second defendants were involved or complicit in the fraudulent act of the third defendant and, therefore, their claim for contribution and indemnity should not be allowed; and (c) the change of name took place on 28 September 2011 but the plaintiff's writ of summons was only filed on 20 April 2015. Therefore, the plaintiff's claim was time-barred by limitation under s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA') as 36 months had passed since the date the plaintiff's cause of action accrued. At the conclusion of the trial, the High Court Judge ('HCJ') found (i) the registration of the change of name was null and void and ought to be set aside as there was overwhelming evidence to show that the registration was done by way of forged documents and fraudulent means; (ii) the issuance of the computerised IDT to the third defendant, while the original manual IDT was still in the plaintiff's possession, was clearly in contravention of s. 8 of the Fourteenth Schedule to the NLC; (iii) the change of name was a nullity and void; (iv) the first and second defendants' title to the land was null and void, notwithstanding the issuance of the computerised IDT to the third defendant and subsequently to the first and second defendants; (v) the third defendant was not an immediate purchaser but a fraudster and impersonator of the plaintiff. Hence, the position of the first and second defendants were as immediate purchasers and not subsequent purchaser of the land; (vi) the third defendant had no title to pass, having obtained the land through void instruments. Therefore, the first and second defendants' title to the land was defeasible pursuant to s. 340(2)(b) of the NLC; (vii) the seventh defendant's

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- A officer, who was in charge of handling the third application for the change of name, failed to exercise due diligence and care in carrying out his responsibility that resulted in the plaintiff's ownership to the land being jeopardised; and (viii) disregarded the seventh defendant's argument, that the plaintiff's claim was time-barred, as this was not pleaded by the seventh
- B defendant. Hence, there was negligence and breach of statutory duty by the seventh defendant. Despite holding the above, the HCJ dismissed the plaintiff's claim for damages as the plaintiff had not been deprived of physical possession and usage of the land and failed to prove that it suffered losses and damages. Hence, the present appeals; one by the seventh defendant and the
- C other by the first and second defendants. The issues that arose for determination were (i) whether the suit filed by the plaintiff, against the seventh defendant, was time-barred by virtue of s. 2(a) of the PAPA; (ii) whether ss. 5 and 6 of the Government Proceedings Act 1956 ('GPA') apply; (iii) whether the seventh defendant had breached its statutory duty under the NLC and was, therefore, negligent when it registered the change
- D of name and, later, in registering the name of the third defendant as the owner of the land; (iv) whether the title of an immediate purchaser, held by the first and second defendants, was liable to be set aside under s. 340(2) of the NLC; and (v) if the title obtained by the first and second defendants was set aside, whether the first and second defendants were entitled to claim for indemnity
- E from the seventh defendant for losses suffered by them in purchasing the land.

Held (dismissing appeals)

Per Zaleha Yusof JCA delivering the judgment of the court:

- F (1) The seventh defendant's argument on limitation of time would only be relevant if it had been raised at the outset of the trial before the witnesses were called because it goes to the jurisdiction of the court; not when it was raised only during the submissions stage, after eight days of full trial had been completed with witnesses called by all parties who had
- G completed giving their evidence. The court must not allow this to become a practice. Much time has been spent to hear witnesses, and to allow this issue, which goes to the jurisdiction of the court, was like conducting a trial by ambush. Moreover, the plaintiff only became aware of the change of name in May 2012 and this was not disputed by the seventh defendant. Therefore, the cause of action only began in May
- H 2012 when the action was filed. The plaintiff was clearly within the 36-month time stipulated to file this action and not caught by limitation. In any event, the land was still registered under the first and second defendants' names which means the land had not been restored to the plaintiff and the injury suffered by the plaintiff was still continuing and
- I had not ceased. (paras 18-21)

- (2) In this appeal, the seventh defendant raised the issue that (i) the plaintiff's action against the seventh defendant was essentially an action in tort against the Government; and (ii) before liability could be attributed to the Government, the actual tortfeasor must be named and liability must be established against him by virtue of ss. 5 and 6 of the GPA. This is again an issue of jurisdiction. The seventh defendant must be estopped from now raising this issue at this appeal stage, having abandoned it at the trial and submissions stage at the court below at the earliest possible time. (paras 22, 23, 29 & 30) A B
- (3) As a keeper of all land titles, it was reasonable to impose upon the land office a duty of care towards all land owners to ensure that the land owners' interests are well-protected and safeguarded. The land office, such as the seventh defendant, has to ensure that the law and proceedings are followed strictly, failing which it could cause the land owners losing their lands. The Legislature could not be expected to specifically list down all the documents required under s. 378 of the NLC as every application is distinct, hence its requirement differs. There was a need for an office flowchart as an administrative guide to the work process. It did exist in the seventh defendant's office but it had not been adhered to. The officers of the seventh defendant need to apply their minds and attention in processing every such application, which they failed to do. (paras 39 & 40) C D E
- (4) Not only had the seventh defendant been negligent in handling the change of name under s. 378 of the NLC, the scheme provided under s. 8 to the Fourteenth Schedule of the NLC had also been breached. The change of name envisaged under s. 378 of the NLC is only in respect of the name of the proprietor and not on the ownership of the land. The ownership of the land remained unchanged. However, after the change of name was registered, the computerised IDT was issued by the seventh defendant in the name of the third defendant as the registered proprietor of the land. There was no reasonable explanation given by the seventh defendant as to why he allowed these utterly questionable transactions to take place. Paragraph (c) of sub-s. 8(9) of the Fourteenth Schedule clearly states that where conversion is effected by the Registrar on his own accord, he shall not be obliged to deliver to the proprietor the computer printed IDT unless the existing IDT is produced to him. It was not disputed that the existing IDT has always been and was still with the plaintiff. Therefore, the act of the seventh defendant in delivering the new computerised IDT to the third defendant was clearly in breach of para. 8(9)(c) of the fourteenth schedule of the NLC. The seventh defendant acted in breach of his statutory duty and, when negligence was shown on his part while performing his duties, the seventh defendant could not be said to be acting in good faith. (paras 42-44) F G H I

- A (5) There was no difficulty in answering issue (iv) in the affirmative. Unlike a subsequent purchaser, the first and second defendants' title to the land was not indefeasible and was liable to be set aside even if they were not party to the fraud committed by the third defendant. (paras 48 & 49)
- B (6) As the first and second defendants' claim against the seventh defendant was based on the tort of negligence, they would be entitled to damages or indemnity if they could prove the seventh defendant had wronged them. The first and second defendants could not simply allege that they have been wronged by the seventh defendant and, therefore, they must be paid. The first and second defendants' case was that (i) they relied on
- C the result of searches conducted through their solicitors; (ii) the computerised IDT of the land was in the name of the third defendant and was issued by the seventh defendant; (iii) this computerised IDT was used by the third defendant to enter into the sale and purchase of land with the first and second defendants. These facts alone did not justify the
- D payment of indemnity. The first and second defendants must first prove their losses. The first and second defendants failed to adduce evidence of any payment of the purchase price made. They failed to show the specified losses that they have suffered. (paras 59, 61 & 62)

Case(s) referred to:

- E *Government Of The State Of Sabah v. Syarikat Rasband* [2010] 7 CLJ 945 CA (*refd*)
Heveaplant Marketing Sdn Bhd v. See Leong Chye & Ors And Other Appeals [2017] 2 CLJ 43 CA (*refd*)
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC (*refd*)
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC (*refd*)
- F *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 FC (*refd*)
Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC (*refd*)
Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal [2017] 3 CLJ 257 FC (*refd*)
Malayan Banking Bhd & Ors v. Tho Siew Wah & Anor And Another Appeal [2017] 7 CLJ 573 CA (*refd*)
- G *Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors* [2014] 8 CLJ 107 HC (*refd*)
Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong [2016] 9 CLJ 297 FC (*refd*)
Pendaftar Hakmilik, Pejabat Tanah Dan Galian Negeri Selangor v. Bank Pertanian Malaysia Bhd [2016] 3 CLJ 851 CA (*refd*)
- H *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441 FC (*refd*)
Re Lim Ah Hee, Ex P Perwira Affin Bank Bhd [2000] 3 CLJ 354 CA (*refd*)
Ronald Beadle v. Hamzah HM Saman & Ors [2007] 1 CLJ 421 CA (*refd*)
Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2013] 1 CLJ 153 HC (*refd*)
Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC (*refd*)
- I *Tan Ah Chio & Ors v. Lua Kim Soon & Ors* [2014] 1 LNS 1004 CA (*refd*)
Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 3 CLJ 751 FC (*refd*)
Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 3 CLJ 271 HC (*refd*)

Legislation referred to:

Civil Law Act 1956, s. 7(5)

Government Proceedings Act 1956, ss. 5, 6

National Land Code, ss. 12, 22, 340(2)(b), (3), 378, Fourteenth Schedule s. 8(9)(c)

Public Authorities Protection Act 1948, s. 2(a)

Rules of Court 2012, O. 16 rr. 1, 4, 5, 7, 8, O. 18 r. 8

Rules of the High Court 1980, O. 18 r. 19(1)

*(Civil Appeal No: B-01(NCVC)(W)-326-09-2017)**For the appellant - Mohd Syarizal Shah Zakaria & Norfariza Ridzuan; Assistant State Legal Advisor, Selangor**For the 1st respondent - Rusdy Ishak, Bruce Lim Cheang Nyok & YapYik Yee; M/s Lim & Yeoh**For the 2nd & 3rd respondents - Brian Ernest Cumming & Teo Qing Qing; M/s Gideon Tan Razali Zaini**(Civil Appeal No: B-01(NCVC)(W)-359-08-2011)**For the appellants - Brian Ernest Cumming & Teo Qing Qing; M/s Gideon Tan Razali Zaini**For the 1st respondent - Rusdy Ishak, Bruce Lim Cheang Nyok & Yap Yik Yee; M/s Lim & Yeoh**For the 6th respondent - Mohd Shahrizal Shah Zakaria & Norfariza Ridzuan; Assistant State Legal Advisor, Selangor**Reported by Najib Tamby***JUDGMENT****Zaleha Yusof JCA:**

[1] There are two appeals before us. Appeal B-01(NCVC)(W)-326-09-2017 (Appeal 326) was filed by Pendaftar Hakmilik Negeri Selangor (PHMS), who was the seventh defendant in the High Court. Appeal B-01(NCVC)(W)(359)-08-2017 (Appeal 359) was filed by Chua Kim Hin and Tan Teng Hock who were the first and second defendants respectively in the High Court.

[2] The subject matter of the dispute here and below is in regard to a piece of land held under H.S.(D)85466, P.T. 24515, Mukim Petaling, Daerah Petaling, Negeri Selangor (the said land). The first respondent in both Appeal 326 and Appeal 359 was the plaintiff in the High Court. The appeals before us were against the decision of the learned High Court Judge who allowed the first respondent's claim that the first respondent is the true and lawful registered owner of the said land. In deciding so, the learned High Court Judge found the appellant in Appeal 326 was negligent and in breach of its statutory duty which resulted in the first respondent to lose the ownership of the said land to the appellants in Appeal 359.

A [3] For ease of reference, parties in these appeals will be referred to as they were in the High Court.

[4] The salient facts of the case can be found in the grounds of judgment of the learned High Court Judge which, for ease of convenience, are reproduced as follows:

B [2] ... The plaintiff is a company incorporated under the Companies Act 1965 and since 1993 is the registered owner of the said Land. It has in its possession the manual IDT of the said Land at all times until today. However on 28.9.2011 a Change of Name pursuant to s. 378 of the National Land Code ('NLC') for the said Land was registered at the land office *vide* Presentation No. 500056/2011. The application for the change of name was filed by the third defendant and a computerised IDT was issued by the land officer under the name of the third defendant, i.e. Spec Development & Construction Sdn Bhd. The third defendant then sold and transferred the said Land to the first and second defendants *vide* a sale and purchase agreement dated 2.12.2011 ('the said SPA') for a consideration of sum of RM2,000,000.00. The memorandum of transfer in favour of the first and second defendants was registered at the land office on 19.4.2012 *vide* Presentation No. 38016/2012 and a new computerised IDT was issued to the first and second defendants.

E [3] Sometime in May 2012, one of the Plaintiff's directors received enquiry from a real estate agent asking whether the plaintiff was interested to buy a piece of land, and the description of that land appeared to be similar to the said Land. A land search was then conducted at the land office, and it was then the plaintiff discovered that there was (a) a registration of change of name in the register of title for the said Land from the plaintiff's name to the third defendant's name, and (b) a registration of transfer from the third defendant to the first and second defendants. Shocked at the discovery, the plaintiff wrote and complained to the land office, and on 17.5.2012 the Pendaftar Hakmilik Negeri Selangor, the 7th defendant, lodged a Registrar Caveat on the said Land. A police report was also lodged by the plaintiff. The plaintiff subsequently also lodged a private caveat on the said Land. Pursuant to the plaintiff's complaint, the land office then conducted an inquiry pursuant to s. 27 of the NLC where both the representative of the plaintiff and the first and second defendants were called. However, it appears that the land office inquiry did not solve the issue as to the true ownership of the said Land and hence the filing of this suit by the plaintiff.

H [4] The essence of the plaintiff's claim herein is for a declaration that the plaintiff is the true and sole registered owner of the said Land. It is the plaintiff's case that the change of name in respect of the said Land from the plaintiff's name to the third defendant's name was fraudulently made and therefore null and void. The 4th, 5th and 6th defendants, at all material times, were the directors of the third defendant. It is also the plaintiff's case that the purported transfer of the said Land from the third defendant to the first and second defendants, and the issuance of the computerised IDT in favour of the first and second defendants are null and void. In other words, the plaintiff avers that the first and second

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defendants' title to the said Land is defeasible under s. 340(2) of the NLC. The plaintiff further claims that, in any event, first and second defendants were not *bona fide* purchasers for valuable consideration and therefore they are not protected by the proviso to s. 340(3) of the NLC. The plaintiff is also claiming damages against the 7th defendant for negligence and breach of statutory duty.

[5] The first and second defendants' case is simply that they were *bona fide* purchasers for value without any notice or knowledge of any defects in the title of the said Land. It is the first and second defendants' case that they have purchased the said Land from the third defendant *vide* the said SPA dated 2.12.2011 for a sum of RM2,000,000.00 which they have fully paid. The first and second defendants also averred that they have conducted the necessary searches and investigation relating to the said Land through their solicitors, and the land searches at the land office confirmed that the third defendant was then registered owner of the said Land. They claim that they are now the lawful and legal registered owner of the said Land where the computerised IDT was issued in their favour. In any event, if the court finds for the plaintiff at the end of the trial of this case, the first and second defendants claim contribution and indemnity from the 3rd, 4th, 5th, 6th, and/or the 7th defendants.

[6] The 3rd defendant together with the 4th, 5th, and 6th defendants did not file any appearances nor appeared in court to contest the plaintiff's claim.

[7] The 7th defendant is the Pendaftar Hakmilik Selangor. The 7th defendant denies any negligence and breach of statutory duty on his part and/or his office's part in respect of the change of name and issuance of the computerised IDT in respect of the said Land. The 7th defendant essentially pleaded that he has duly exercised his statutory duty in accordance to the provisions of the NLC. As for the claim for contribution and indemnity by the first and second defendants, the 7th defendant averred that first and second defendants were involved or complicit in the fraudulent act of the 3rd defendant and therefore their claim for contribution and indemnity should not be allowed.

Findings Of The High Court

[5] The learned High Court Judge found there was overwhelming evidence to show that the registration of the change of name from the plaintiff's name to the third defendant's name was done by way of forged documents and by fraudulent means. Hence the registration of the change of name from the plaintiff to the third defendant is null and void and should be set aside.

[6] Her Ladyship also observed that the issuance of the computerised IDT to the third defendant while the original manual IDT for the said land is still in the possession of the plaintiff was clearly in contravention of the scheme provided under s. 8 of the Fourteenth Schedule of the NLC. As the change of name from the plaintiff to the third defendant is a nullity and void, on this

- A ground alone it can be held that the first and second defendants' title to the said land is null and void, notwithstanding the issuance of the computerised IDT to the third defendant and subsequently to the first and second defendants.
- B [7] The learned High Court Judge further found the third defendant was not an immediate purchaser but a fraudster and impersonator of the plaintiff. Hence the position of the first and second defendants in the transaction was as the immediate purchasers and not subsequent purchasers of the said land. Her Ladyship found support in the Federal Court's case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768.
- C The third defendant had no title to pass, having obtained the land through void instruments. Thus, the first and second defendants' title to the said land became defeasible pursuant to s. 340(2)(b) of the NLC because the registration of the transfer was obtained by means of void instrument.
- D [8] Based on the totality of the evidence before the court, Her Ladyship also found that the first and second defendants were not *bona fide* purchasers of the said land as there was no proof that the purported RM2 million had been paid in full. Moreover, the first defendant was a director of the third defendant and only resigned on 15 November 2011 and was replaced by the fourth defendant; whilst the discussion to buy the said land between the first
- E defendant and the fourth defendant was made around 28 September 2011, the same date the registration of change of name was done.
- F [9] As for the seventh defendant, Her Ladyship found there were evidence to show that DW4, the officer of the seventh defendant who was the officer in charge at the material time in handling the third defendant's application for the change of name, had failed to exercise due diligence and care in carrying out his responsibility that resulted in the plaintiff's ownership to the said land being jeopardised. Hence, she found there was negligence and breach of statutory duty by the seventh defendant in the registration of the change of name for the said land from the plaintiff to the third defendant.
- G Since Her Ladyship found the seventh defendant to be negligent and in breach of statutory duty, she was of the view that s. 22 of the NLC could not render protection to the seventh defendant
- H [10] However, Her Ladyship found the plaintiff had not been deprived of physical possession and usage of the said land and failed to prove that it had suffered loss and damages. Hence, the plaintiff's claim for assessment of damages against the seventh defendant as well as against other defendants was dismissed.
- I [11] Finally, on the issue of the plaintiff's claim was time-barred by limitation under s. 2(a) of the Public Authorities Protection Act 1948 (Act 198) as raised in the submissions of the learned Assistant State Legal Advisor of Selangor (ALA) for the seventh defendant was disregarded by the learned High Court Judge as this was not pleaded by the seventh defendant.

Issues

[12] As alluded to above, only the first and second defendants and the seventh defendant are appealing against the decision of the learned High Court Judge. The plaintiff does not appeal. As the appeals are intertwined, we shall deal with the issues in both appeals together. The issues are:

- (i) whether the suit filed by the plaintiff against the seventh defendant was time barred by virtue of s. 2(a) of Act 198;
- (ii) whether ss. 5 and 6 of the Government Proceedings Act 1956 (Act 359) apply;
- (iii) whether the seventh defendant had breached its statutory duty under the NLC and therefore negligent when it registered the change of name of the plaintiff to the name of the third defendant; and later in registering the name of the third defendant as the owner of the said land;
- (iv) whether the title of an immediate purchaser such as the first and second defendants is liable to be set aside under s. 340(2) of the NLC;
- (v) if the title obtained by the first and second defendants is set aside, whether the first and second defendants are entitled to claim for indemnity from the seventh defendant for losses suffered by them in purchasing the said land.

Our Decision

Whether The Suit Filed By The Plaintiff Against The Seventh Defendant Was Time Barred By Virtue Of s. 2(a) Of Act 198

[13] Section 2(a) of Act 198 provides, *inter alia*, as follows:

... (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect of default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[14] Learned ALA for the seventh defendant argued that the change of name took place on 28 September 2011. The writ of summons was only filed on 20 April 2015. Hence the action filed by the plaintiff was clearly caught by limitation as more than 36 months had passed from the date of the change of name being the date the cause of action arose till the date of the filing of the suit and this was against s. 2(a) of Act 198. He argued that the provision of s. 2(a) is absolute and therefore need not be pleaded. He relied, *inter alia*, on the case of *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751 where the Federal Court had, *inter alia*, stated as follows:

[25] After scrutinising the authorities above we agree with the submission of the plaintiff that in an application for striking out under O.18 r. 19(1) RHC on the ground of limitation to bring an action, a distinction must be made as to which provision of the law is used to ground such

A application. *If it is based on s. 2(a) of PAPA or s. 7(5) of the Civil Law Act, where the period of limitation is absolute then in a clear and obvious case such application should be granted without having to plead such a defence.* However, in a situation where limitation is not absolute, like in a case under the Limitation Act, such application for striking out should not be allowed until and unless limitation is pleaded as required under s. 4 of the Limitation Act. Our reasons are these:

B [26] Section 4 of the Limitation Act is explicit when it declares that “nothing in this act shall operate as a bar to an action unless this Act has been expressly pleaded ...” This phrase is clear and unambiguous. It demands the defendant to expressly state this as a defence before it can become effective. *This differs from s. 2(a) of PAPA which said that no suit, action, prosecution or proceeding “shall not lie or be instituted unless” it is commenced within a certain specified time. The same applied to s. 7(5) of the Civil Law Act which says “such action shall be brought within three years after the death of the deceased’s person”. This is absolute and as Thomson LP in Kuan Hip Peng v Yap Yin & Anor (supra) said it “gives no room for doubt as to when it begins to run”. And on top of this there are exceptions provided in the Limitation Act as well as the option for the defendant to waive this defence. These are absent in both the PAPA and the Civil Law Act ...” (emphasis added)*

[15] Learned counsel for the plaintiff on the other hand argued that the issue of limitation cannot now be raised by the seventh defendant as it had not been pleaded contrary to O. 18 r. 8 of the Rules of Court 2012 (ROC) which provides:

8. Matters which shall be specifically pleaded. (O. 18 r. 8)

F (1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

G (c) which raises issues of fact not arising out of the preceding pleading.

[16] He further argued that the case of *Tasja, supra*, only relates to application for striking out under O. 18 r. 19(1) of the Rules of the High Court 1980 (RHC). It does not state as a rule that a defence of limitation based on s. 2(a) of PAPA or s. 7(5) of the Civil Law Act 1956 (CLA) is not required to be pleaded at all. The words “... shall be specifically pleaded ...” in O. 18 r. 8 of the ROC make it mandatory to plead the relevant statute of limitation as a defence to an action.

I [17] However, he further submitted that if the rule as propounded in *Tasja, supra*, extends to all cases, the plaintiff is relying on the second part of s. 2(a) of Act 198 and therefore is still not time-barred from filing the action as the loss and damages are still continuing and yet to cease as of this date.

[18] We have painfully considered this issue. With due respect to the learned ALA, we find this argument would only be relevant if it had been raised at the outset of the trial before witnesses were called because it goes to the jurisdiction of the court. But not when it was raised only during the submissions stage, after eight days of full trial had been completed with witnesses called by all parties who had completed giving their evidence. This court must not allow this to become a practice. Much time have been spent to hear witnesses, and to allow this issue, which goes to the jurisdiction of the court, is like conducting a trial by ambush.

[19] Moreover, when questioned by this court, the learned ALA did not dispute that the plaintiff only became aware of the change of name in May 2012. Hence, we find the cause of action actually began only in May 2012. As the action was filed on 20 April 2015, the plaintiff was therefore clearly within the 36-month time stipulated to file this action.

[20] In any event, it is also not disputed that the said land is still registered under the first and second defendants' names which means the said land has not been restored to the plaintiff which also means the injury suffered by the plaintiff is still continuing and has not ceased. This court in *Ronald Beadle v. Hamzah HM Saman & Ors* [2007] 1 CLJ 421 in discussing s. 2(a) of Act 198 had, *inter alia*, stated as follows:

[17] Two sets of situations are therefore envisaged for the limitation periods stipulated therein to arise. The first set deals with where the 'act, neglect or default complained of' referred to is confined to a single act, neglect or default and does not involve an element of continuance thereof and that a single act *per se* would constitute a complete cause of action. (See: *(Malaysia) in Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 (SC).

[18] The other set is where the limitation period begins to run when the injury or damage ceases. (See: *Ibrahim Mohideen Kutty v. Timbalan Menteri Dalam Negeri, High Court* [2003] 6 CLJ 144)

...

[23] Further, we are also in agreement with learned counsel for the appellant that during the period when the passport of the appellant was retained by the respondents the damage to the appellant continued. Hence, his cause of action only began to run from the time his passport was released, that is, from 24 April 1998. Since he filed his claim on 21 May 2000 he was therefore well within the 36 months period as prescribed in the second limb of s. 2(a) of PAPA.

[21] Similarly, in the instant appeal, the injury or damage to the plaintiff is still continuing and yet to cease as submitted by learned counsel for the plaintiff. Hence the action brought by the plaintiff is in our view not caught by limitation.

A *Whether ss. 5 And 6 Of The Government Proceedings Act 1956 (Act 359) Apply*

[22] This is again an issue of jurisdiction. Although this had been raised in para. 38 of seventh defendant's statements of defence at the High Court, the learned High Court Judge made no mention of it in her grounds of judgment. Probably because the issue was not put to any witness, neither was it argued in the submissions before Her Ladyship.

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[23] However, before us, the seventh defendant raised the issue. The learned ALA submitted that the plaintiff's action against the seventh defendant was essentially an action in tort against the Government. Therefore, before liability can be attributed to the Government, the actual tortfeasor must be named and liability is established against him as provided by ss. 5 and 6 of Act 359.

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[24] Sections 5 and 6 of Act 359, *inter alia*, provide as follows:

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5. Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purpose of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instruction of the Government.

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6.(1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

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[25] The seventh defendant cited the cases of *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 4 CLJ 508; [2000] 4 MLJ 200; *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 and *Government of the State of Sabah v. Syarikat Rasband* [2010] 7 CLJ 945 to support his contention.

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[26] Learned counsel for the first and second defendants had urged this court not to allow the seventh defendant to raise this issue at the appeal stage as it had abandoned the issue at the trial and therefore the issue was never canvassed before and not considered by the learned High Court Judge. Learned counsel for the first and second defendants cited the Supreme Court in *Lian Keow Sdn Bhd (In liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449; this court in *Pendaftar Hakmilik, Pejabat Tanah dan Galian Negeri Selangor v. Bank Pertanian Malaysia Bhd* [2016] 3 CLJ 851 and in *Re Lim Ah Hee, Ex P Perwira Affin Bank Bhd* [2000] 3 CLJ 354; [2000] 1 AMR 1177 and Privy Council in *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457 to support his arguments.

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[27] Learned counsel for the first and second defendants further submitted that ss. 5 and 6 of Act 359 are not applicable to this case as the plaintiff's claim against the seventh defendant was for negligence and or in breach of its statutory duties pursuant to the NLC. Hence the NLC applies and not Act 359. The cases cited by the learned ALA are distinguishable as they deal with tortious action against the Government and do not come within the ambit of the NLC. He cited the recent decision of this court in *Malayan Banking Bhd & Ors v. Tho Siew Wah & Anor And Another Appeal* [2017] 7 CLJ 573 to support his argument.

[28] Learned counsel for the plaintiff adopted the submissions of learned counsel for the first and second defendants on this issue; that it is proper and sufficient that the seventh defendant, Pendaftar Hak Milik Negeri Selangor, be named as the seventh defendant in the action.

[29] Having heard and read the arguments of the parties on this second issue, we are more inclined to agree with learned counsel for the first and second defendants that the seventh defendant must be estopped from now raising this issue at this appeal stage, having abandoned it at the trial and submissions stage at the court below. In *Pendaftar Hakmilik, Pejabat Tanah dan Galian Negeri Selangor v. Bank Pertanian Malaysia Bhd* [2016] 3 CLJ 851, this court when faced with similar issue had this to say:

[86] With regard to the issue that the respondent has failed to name the tortfeasor raised by the appellant, the law on ss. 5 and 6 of the GPA 1956 is very settled in that it is mandatory to name a tortfeasor if the Government is to be made liable in tort for the negligence or omission by any public officer. Liability can only be attributed to the Government where the officer's act, neglect or default is proved to have established the liability of the officer personally – see *Government of The State of Sabah v. Syarikat Rasband* [2010] 7 CLJ 945.

[87] *However it was submitted by learned counsel for the respondent that this issue of not naming the tortfeasor was never raised before the High Court and the learned judge never had the opportunity to address the issue in her judgment. This issue was also not raised in the appellant's memorandum of appeal. Therefore nothing more should be said on it.* (emphasis added)

[30] Like the first issue, the second issue also goes to the jurisdiction of the court. It therefore must be raised and argued before the trial court at the earliest possible time. Certainly not at this stage when the seventh defendant had lost the case. What if the seventh defendant was to win at the trial stage, this issue would surely not be raised at the appeal!

[31] Be that as it may, we also echo the view of this court in *Tho Siew Wah, supra*. In that case, this court held that the Registrar of Titles, Selangor was the correct party to be sued. In delivering the judgment of the court, Justice Abang Iskandar JCA (as he then was) had, after laying down the provisions of s. 12 of NLC, stated as follows:

- A [27] In view of the clear provision as contained thereunder, we are of the view that it would be sufficient, for the purpose of making a claim for damages and/or indemnity and contribution, to name the “Pendaftar Hakmilik Negeri Selangor”, as the defendant.
- B [28] Having considered the contentions of both parties, it is our view the provisions of the GPA do not apply in this case. This is because the NLC makes specific provisions as to the correct party to be sued in s. 12 of the NLC. Looking at how the statement of claim is couched, this is an action against the officer appointed as **the Registrar** of Titles, an office and appointment made by the State Authority, as can be seen under s. 12(1)(a) of the NLC. According to sub-s. (4) to s. 12 of the NLC, “The State
- C Director, the Registrar and every Land Administrator, shall each have a seal of office, and every instrument purporting to bear any such seal, and to have been signed by or on behalf of the officer in question shall, unless the contrary be proved, be deemed to have been sealed and signed by him or at his direction. (emphasis added.)
- D [29] What that means is that any act relating to any instrument that bears the seal or signature of the Registrar or on behalf of the Registrar, is deemed unless the contrary is proven, to be attributable to the Registrar or done in his direction.
- E [30] In this case, the Registrar of Titles, Selangor was the Registrar of Titles where the subject land was situated and where the land officers issuing and registering the land titles were working at the material time. It was alleged by the first, second, and third defendants that the negligence of the Registrar of Titles, Selangor had caused them to suffer losses. The question that needed to be answered would necessarily be: ‘who was to be held liable for such losses and who was to be sued, in the circumstances?’
- F [31] We reiterate that s. 12 answers that question more than adequately. We as supported in our view by Abdoolcader FJ’s judgment in *Government of the State of Negeri Sembilan v. Yap Chong Lan & Ors and Another Case* [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144; [1984] 2 MLJ 123 (“*Yap Chong Lan case*”) which reads as follows:
- G At the inception of the hearing the State Legal Adviser who appeared for the State Government and the Director of Lands and Mines took a preliminary objection to the joinder of the State Government as a party to the proceedings in view of the provisions of section 16(2). The learned Judge deferred his decision on this
- H point until the conclusion of the trial and in his reserved judgment dismissed it on the grounds that ‘because of the various declarations sought against it, the State Government ‘should be a proper and necessary party and ought to be heard, for the purpose of completely adjudicating on all the issues herein.’ We must with respect say that this is a paralogism as it involves the fallacy of
- I *petitio principii*; it begs the question as there can be no question of any relief being accorded against the State Government if it is not a proper party. The State Government as such has nothing to do

with proceedings under the Code. It is the State Authority that is the pertinent entity, and State Authority is defined in section 5 to mean the Ruler or Governor of the State, as the case may be. Section 12(1) provides for the State Authority to appoint a Director of Lands and Mines for the State and sub-section (3) of that section specifies his functions, powers, duties and responsibilities. Section 16 enacts provisions for actions by and against the State Authority, and sub-section (2) thereof specifically stipulates that any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the Director of Lands and Mines of the State in the name of his office. It is accordingly abundantly clear that the State Government should never have been joined in the proceedings and on the preliminary objection taken it should have been discharged as a party thereto. There appears to be a popular misconception on this aspect of the matter and on the role of the Government of a State as such in relation to the Code with the resultant indiscriminate misjoinder of State Governments as parties in proceedings thereunder, and we expect due heed to be taken of the point we make in this regard.

[32] Therefore, the Registrar of Titles, Selangor is the correct party to be sued. Another English case of relevance is that of *Ministry of Housing and Local Government v. Sharp and Another* [1970] 2 QB 223 (“*Sharp* case”)

[33] In this regard, we would refer the judgment of Lord Denning in *Sharp* case (*supra*) where the learned judge said:

Who, then, is to bear the loss? The negligent clerk can, of course, be made to bear it, if he can be found and is worth the money – which is unlikely. Apart from the clerk himself, there is only one person in law who can be made responsible. It is the registrar. He must answer for the mistakes of the clerk and make compensation for the loss. He is a public officer and comes within the settled principle of English law that, when an official duty is laid on a public officer, by statute or by common law, then he is personally responsible for seeing that the duty is carried out. He may, and often does, get a clerk or minor official, to do the duty for him, but, if so, he is answerable for the transgression of the subordinate: see *Sanderson v. Baker* [1972] 3 Wils 309, 317, where Blackstone J states the position of the sheriff. Sometimes it is an absolute duty, in which case he must see that it is performed absolutely: see the instances given by Holt CJ in *Lane v. Cotton* [1701] 1 Ld Raym 646, 651. At other times, it is only a duty to use due diligence, in which case he must see that due diligence is used: see the celebrated judgment of Best CJ in *Henly v. Lyme Corpn* [1828] 5 Bing 91, 107-109. But, in any event, if the duty is broken, and injury is done thereby to one of the public, then the public officer is answerable. The injured person can sue him in the civil court for compensation ...

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A [34] Reverting to our case, the Registrar of Titles is responsible for the acts of the officers under its immediate control in the matter of managing the registration of land titles under its purview at the Land Office Registry in Gombak Land District, Selangor. That is clear from the provisions of s. 12(4) of the NLC. In this case, the Registrar of Titles, Selangor did not notify the plaintiff of the re-delineation although it would directly affect her land. Neither did the Registrar of Titles, Selangor request the plaintiff to surrender her old land title that was in her possession. The surrender of the old land title would enable the Registrar of Titles, Selangor to have it duly destroyed before a new title deed to the land was issued. Again, once, the new title deed to the land was issued, the Registrar of Titles, Selangor would have to notify the plaintiff to collect the same from the land office. The witness for the Registrar of Titles, Selangor was not able to confirm from the records kept by their office whether the plaintiff was ever notified to collect the new title deed to her land. Neither did they know the identity of the person who had collected the new title deed from the Land Office Registry. It was however not disputed that the plaintiff never collected the new land title deed as she was in possession of the old title deed at all material times. It was no surprise then that the Registrar of Titles, Selangor admitted that someone had come to their office to collect the new title deed to the land and that the new title to the land was indeed released to that person. That the Registrar of Titles, Selangor was not able to confirm with certainty who had collected the new land title deed was indeed very telling. That was the basis from the claim for contribution from the Registrar of Titles, Selangor.

E [35] In the circumstances, we reiterate our conclusion that, it is sufficient and proper, that the Registrar of Titles, Selangor be named and cited as was done by the plaintiff in this case. As such, we find no merit in the preliminary point raised by the learned ALA and we therefore hold it as unsustainable. The preliminary point is therefore dismissed.

F [32] We find no reason not to adopt the reasoning in *Tho Siew Wah, supra*, and therefore hold that the plaintiff herein was correct in naming the Pendaftar Hakmilik Negeri Selangor as the seventh defendant. As submitted by learned counsel for the plaintiff, cases have shown that the Pendaftar Hakmilik has been made a party in other suits and is held liable for negligence and hence for breach of statutory duty. One of such cases is the decision of the Federal Court in *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong* [2016] 9 CLJ 297.

H *Whether The Seventh Defendant Had Breached Its Statutory Duty Under The NLC And Therefore Negligent When It Registered The Change Of Name Of The Plaintiff To The Name Of The Third Defendant And Later In Registering The Name Of The Third Defendant As The Owner Of The Said Land*

I [33] It was the contention of the learned ALA that the seventh defendant had at all material time performed its statutory duties as provided by the NLC in particular s. 378 which reads, *inter alia*, as follows:

S. 378. Change of name by proprietors, etc

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The Registrar may, upon the production to him of evidence (whether in the form of deed poll, official certificate, statutory declaration or otherwise) from which he is satisfied of a change of name on the part of any person or body in whom any alienated land or interest is for the time being vested, or at whose instance a caveat has been entered in respect of any land or interest, make a memorial of the change in the relevant register document of title and in any issue document of title or other instrument relating to the said land or interest.

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[34] It was his contention that the learned High Court Judge was wrong in finding PW4 was negligent in registering the change of name when s. 378 was clear and unambiguous and did not specifically state the type of documents which needed to be attached to the application. Section 378 does not put extra burden on PW4 but only requires the production of documents which can satisfy the seventh defendant.

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[35] In any event, the learned ALA submitted that s. 22 of the NLC which provides as follows, gives protection to the seventh defendant:

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22. Protection of officers

No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

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[36] Learned counsel for the plaintiff submitted that the learned High Court Judge's finding on this issue should not be disturbed as it was based on the totality of evidence after hearing and seeing the demeanour of the witnesses during trial and after critically analysing the documentary evidence.

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[37] The learned High Court Judge's finding on this issue can be found in paras. [31] to [33] of Her Ladyship's grounds of judgment. To be coherent, we reproduce the said paragraphs as follows:

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[31] The 7th defendant as Pendaftar Hakmilik Negeri Selangor and his office are charge with the responsibility to reasonably maintain an efficient and accurate particulars of land registration. The starting point, in so far as our present case, that resulted in the change of ownership of the said Land was the Registration of the change of name from the plaintiff to the third defendant. The 7th defendant's witness, DW4, was the officer in charge at the material time in handling the third defendant's Permohonan Untuk Menukar Nama (at page 10 of Bundle B). One of the documents required, based on the 7th defendant's own office "carta aliran dan proses/fail meja", which is essentially a checklist, is the Form 13 from SSM. The Form 13 as I have referred to earlier is the confirmation of change of name of a company as certified by the SSM. In our present case, the Form 13 used by the third defendant for the registration of the change

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- A of name can be seen at page 12 of Bundle B. It appears that DW4 did not pay much attention to this Form 13 at the material time as otherwise he would have noticed the following:
- (a) that the Form 13 was issued under the name of Pejabat Pendaftar Syarikat and not SSM; and
- B (b) that the third defendant's company registration number is 464962-X, which is different from the plaintiff's company registration number 9110/82 (as appeared in the land office record).

C These two anomalies should have triggered alarm bell to DW4 that something was amiss. Instead DW4 proceeded to register the change of name and in fact even changed and made 'correction' to the plaintiff's company number in the office file. DW4 is actually keenly aware that a change of name under s. 378 of the NLC does not involve a change of ownership of the said Land. It is not a reasonable excuse for DW4, or any officers of the 7th defendant for that matter, to say that he was not knowledgeable about the fact that a change of company name does not involve a change of company number. Further, it is common knowledge that Pejabat Pendaftar Syarikat no longer exist at the material time and has been replaced by SSM. But DW4 failed to realise this.

E [32] It is the evidence of DW4 that the other important mandatory document for registration of a change of name under s. 378 of the NLC is the original issue document of title or IDT. DW4 testified that the IDT for the said Land was submitted together with the application for the change of name but the said IDT was cancelled and destroyed. The computerised IDT was issued for the said Land naming the third defendant as the registered owner. Therefore there is no way now to know how that destroyed IDT looks like but based on the fact that the original manual IDT is actually still with the plaintiff, it can only be surmised that the destroyed IDT must be a fake one.

F [33] It is therefore my judgment that there was negligence and breach of statutory duty by the 7th defendant in the registration of the change of name for the said Land from the plaintiff to the third defendant. DW4 has failed to exercise due diligent and care in carrying out his responsibility that resulted in the plaintiff's ownership to the said Land been jeopardised. In view of such negligent act and breach of statutory duty, I do not think the 7th defendant can rely on the protection provided by s. 22 of the NLC.

H [38] With due respect to the learned ALA, we find the argument put forward is a hollow one and does not hold water. We cannot expect the Legislature to specifically list down all the documents required under s. 378 as every application is distinct, hence its requirement differs. Hence the need for an office flowchart as an administrative guide to the work process. It did exist in the seventh defendant's office but the learned High Court Judge found it had not been adhered to by PW4. Officers of the seventh defendant are not robots and therefore they need to apply their minds and attention in processing every such application, which the learned High Court Judge found they had failed to do so.

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[39] As a keeper of all land titles, for a particular State (in this case Selangor) it is reasonable to impose upon the land office, including the seventh defendant, a duty of care towards all landowners, to ensure that the landowners' interests are well protected and safeguarded. The land office, including the seventh defendant, has to ensure that the law and proceedings are followed strictly, failing which it can cause the landowners losing their lands.

[40] We find the learned High Court Judge had correctly, in para. [16] of Her Ladyship's grounds of judgment, explained the process needed to be followed in converting, first, the existing register documents of title to the computerised register documents of title, and then converting the existing issue documents of title to the computerised issue documents of title; as follows:

... Under the scheme of s. 8 of the 14th Schedule, the Registrar, *inter alia*:

- (a) shall convert the existing register [*sic*] documents of title (not the IDT) to computer printed register [*sic*] of title – see s. 8(1) of the 14th Schedule. It must be noted that the register [*sic*] documents of title are kept by the land office, while the issue document of title (the IDT) is usually kept by the registered proprietor of the land;
- (b) an existing register [*sic*] document of title shall however continue to be in force and valid until a computerised printed of the same is prepared, signed and sealed by the Registrar – see s. 8(2) of the 14th Schedule;
- (c) after conversion as above of the register [*sic*] document of title, the existing IDT (that is kept by the registered proprietor and in our case referred to as the manual IDT) shall continue to be in force and valid until a computerised version of the same is prepared and issued to the proprietor – see s. 8(3) of the 14th Schedule;
- (d) any registered proprietor of a land may apply to convert his manual IDT to computerised IDT by surrendering or lodging the original IDT to the land office – see s. 8(4) of the 14th Schedule;
- (e) but the Registrar himself may on his own accord convert any existing IDT to computerised IDT without there being an application made by the registered proprietor – see s. 8(5) of the 14th Schedule;
- (f) then upon conversion of the existing document of titles (i.e. both the register [*sic*] document of title and the IDT) of the particular land, the Registrar SHALL, *inter alia*:
 - (i) call the registered proprietor to take delivery of the computerised IDT, and if the conversion was done by the Registrar on his own accord pursuant to s. 8(5) of the 14th Schedule, then the Registrar shall not be obliged to deliver to the proprietor the computerised IDT unless the existing manual IDT is produced to him – see s. 8(9)(c) of the 14th Schedule; and

- A (ii) cancel and destroy the existing manual IDT when submitted to him – s. 8(9)(d) of the 14th Schedule.

[41] Based on the decision of the High Court in *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153; [2013] 7 MLJ 755 and the case of *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271; [2012] 8 MLJ 713 the learned High Court Judge found that the seventh defendant had acted in contravention of the scheme provided under s. 8 of the Fourteenth Schedule when it issued the computerised issue document of title to the third defendant while the original manual issue document of title for the said land was still in the possession of the plaintiff.

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C Instead of requesting the plaintiff to take delivery of the computerised issue document of title, the seventh defendant had issued and delivered it to the third defendant who was not the then existing proprietor of the said land.

[42] We find no reason to disturb this finding of the learned High Court Judge. Not only had the seventh defendant been negligent in handling the change of name under s. 378 of the NLC, the scheme provided under s. 8 of the Fourteenth Schedule had also been breached. It must be emphasised that the change of name envisaged under s. 378 is only in respect of the name of the proprietor and NOT on the ownership of the land. The ownership of the land remains unchanged. However, the evidence showed that after the change of name was registered, the computerised issue document of title was issued by the seventh defendant in the name of the third defendant as the registered proprietor of the said land. There was no reasonable explanation given by the seventh defendant as to why he allowed these utterly questionable transactions to take place. Paragraph (c) of sub-s. 8(9) of the Fourteenth Schedule clearly states that where conversion is effected by the Registrar on his own accord, he shall not be obliged to deliver to the proprietor the computer printed issue document of title unless the existing issue document of title is produced to him. It is not disputed that the existing issue document of title has always been and is still with the plaintiff.

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[43] Therefore, the act of the seventh defendant in delivering the new computerised issue document of title to the third defendant was clearly in breach of para. 8(9)(c) of the Fourteenth Schedule of the NLC. See the recent decision of the Federal Court in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441.

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[44] We hold that when the seventh defendant acted in breach of his statutory duty and when negligence is shown on his part while performing his duties, the seventh defendant cannot be said to be held to be acting in good faith. Consequently, he is disqualified from the protection of s. 22 of the NLC. See – *Uptown Properties Sdn Bhd* and also the Federal Court in *Poh Yang Hong, supra*.

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Whether The Title Of An Immediate Purchaser Such As The First And Second Defendants Is Liable To Be Set Aside Under s. 340(2) Of The NLC

[45] It is interesting to note that learned counsel for the first and second defendants had in his oral submission before this court admitted that the first and second defendants are actually “immediate purchaser” under the NLC. They have abandoned the issue that the first and second defendants are *bona fide* purchasers for value.

[46] The position of an immediate purchaser has been discussed in many cases. Suffice for us to quote only one decision of the Federal Court in *Kamarulzaman Omar*, *supra*, at p. 1024 (CLJ); p. 796 (MLJ) as follows:

[38] In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were *bona fide* subsequent purchasers. *But for the fifth and sixth respondents to have been bona fide subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents.* The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgement, the defeasible title of the fifth and sixth respondents was also defeated. (emphasis added)

[47] The Federal Court in that case found the fifth and sixth respondents therein were immediate purchasers and so were not protected by the provisions of s. 340(3) of the NLC. In *Pushpaleela's* case, *supra*, the Federal Court was of the opinion that the land title would be void *ab initio* if the land registry had in blatant breach of its duty under the NLC wrongfully registered any land in the register document of title and issued the replacement issue document of title in the name of a third party. In this instant appeal, we have already found that seventh defendant to be in breach of its statutory duty in handling the change of name and in issuing the computerised issue document of title.

A [48] Reverting back to our case, unlike a subsequent purchaser, the first and second defendants' title to the said land is not indefeasible and liable to be set aside even if they were not party to the fraud committed by the third defendant.

B [49] Based on the above two authorities that we cited above, we find no difficulty to answer this fourth issue in the affirmative.

If The Title Obtained By The First And Second Defendants Is Set Aside, Whether The First And Second Defendants Are Entitled To Claim For Indemnity From The Seventh Defendant For Losses Suffered By Them In Purchasing The Said Land

C [50] Learned counsel for the first and second defendants submitted that the learned High Court Judge erred in finding that this claim for indemnity against the seventh defendant cannot be entertained as they were not *bona fide* purchasers for value. Learned counsel found support in the case of *Overseas Reality Sdn Bhd v Wong Yau Choy & Ors* [2014] 8 CLJ 107; [2014] 3 AMR 703 wherein the land office was ordered to indemnify the defendants *albeit* that they were not *bona fide* purchaser.

E [51] They further submitted that the learned High Court Judge erred when Her Ladyship failed to appreciate that the seventh defendant did not file any statement of defence to the first and second defendants' third party notice issued under O. 16 r. 8 of the ROC dated 28 September 2015 and therefore are deemed to admit their claim.

F [52] The learned ALA submitted that there was no evidence produced in court that the first and second defendants had paid the full purchase price to the third defendant. He further submitted that the learned High Court Judge was correct in her finding based on the totality of evidence that the first and second defendants were privy or at least had knowledge of the fraud committed through the third defendant in obtaining ownership of the said land. Hence, relying on this court's decision in *Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors And Other Appeals* [2017] 2 CLJ 43; [2016] 1 MLJU 835, the first and second defendants cannot benefit from their own wrongful conduct.

H [53] The learned ALA also submitted there is nothing in the NLC which allows damages or indemnity to be paid pursuant to the provisions of s. 340 of the NLC. He relied on the Federal Court's decision in *Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal* [2017] 3 CLJ 257.

I [54] Let us first look at the purported failure of the seventh defendant to file any statement of defence to the third party notice issued by the first and second defendants pursuant to O. 16 r. 8 of the ROC. Does it mean the seventh defendant is deemed to admit the first and second defendants' claim and judgment can be entered against the seventh defendant to pay damages or to indemnify the first and second defendants?

[55] The notice given as shown at pp. 122-131 record of appeal vol. 1 is similar to Form 18 issued under O. 16 r. 1 of the ROC. Order 16 governs a third party proceedings. There are steps or procedures to be taken or followed before a judgment can be entered in a third party proceedings. Serving the notice alone is not sufficient. The seventh defendant need not file an appearance as it was already a party and had already entered appearance in the main suit. However, before parties are bound to serve any defence to the notice, a court's direction must first be obtained pursuant to O. 16 r. 4 and the order has to be in Form 23 of the ROC. It is for the court to give direction on the filing of defence. The seventh defendant shall be deemed to admit the claim stated in the third party notice only if it has been ordered by the court to serve a defence and he fails to do so. See O. 16 r. 4 and r. 5 of the ROC. We find there is no evidence that such direction of the court had been obtained by the first and second defendants. Hence the first and second defendants' submissions that the learned High Court Judge erred on this issue is clearly misconceived. As there was no such direction obtained, it was only right for the court to decide on the issue of the third party indemnity after the trial. See O. 16 r. 7 of the ROC.

[56] We agree with the first and second defendants that the fact that they are immediate purchasers do not disentitle them from claiming for indemnity from the seventh defendant if they can prove that the seventh defendant is the one who has caused losses to them. The first and second defendants' case is that they rely on the result of searches conducted through their solicitors. The computerised issue document of title of the said land was in the name of the third defendant and was issued by the seventh defendant. This computerised issue document of title was used by the third defendant to enter into the sale and purchase agreement of the said land with the first and second defendants. But for the reasons which we will explain below, these facts alone do not justify the payment of indemnity.

[57] The learned ALA had brought to our attention the following paragraphs in *Low Huat Cheng, supra*, wherein the Federal Court had stated as follows:

[48] Given the above circumstances, the most important question that we must ask here is whether *in lieu* of the retransfer of the property, a claim in damages is available to the plaintiff as the true owner of the property under s. 340 of the NLC. In our judgment, the question must be approached on the basis of the provision itself. The plaintiff's case must stand and fall on the basis of this specific provision. It is to that provision we must look at. It is necessary to read the wordings and purport of the provision with great care. The first important point to notice is that s. 340(2) of the NLC creates a cause of action, which is in effect a form of action independent of any common law claim for tort or breach of contract. Over and above this, it is important to appreciate that the cause of action envisaged under s. 340 of the NLC is a statutory claim, where the relief is explicitly specified therein, that is to say, setting aside the title or interest in question. Once the legislative scheme in s. 340 is properly

- A understood, it is apparent that the provision does not envisage a relief in damages at all; there is clearly no provision in relation to damages. In this regard, there is a general rule that when right is created by a statute and a special sanction is also given by the same statute regard must be had to that sanction, and the obligation can only be enforced in the prescribed manner (see *The Cobar Corporation Limited and Rubind Henrik Corbett (t=Trustee) v. The Attorney-General For New South Wales* [1909] 9 CLR 378).
- B ...
- C [57] As a result, for all the reasons set forth earlier, we therefore conclude that s. 340 of the NLC does not provide for the remedy of damages. In our judgment, all that s. 340 provides is the setting aside of the impugned title or interest upon one or more of the grounds of defeasibility specified therein. Yet again, keeping in mind that it is an action *in rem*, which is an action directed towards property, we are not at all convinced that under s. 340 of the NLC the court has the power to award damages. With respect, both the High Court and the Court of Appeal erred in law and in fact culminating in a miscarriage of justice in holding that as the third and fourth defendants were in no position to return the property to the plaintiff, they were statutorily bound to make good such loss by paying damages. This is in itself sufficient to warrant appellate interference on our part.
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- E [58] However, with respect, the learned ALA did not bring to our attention paras. [60] and [61] of the same judgment which stated as follows:
- F [60] We once again return to the present case. The plaintiff's claim *in personam* for damages against the third and fourth defendants was founded in tort of negligence. In his statement of claim the plaintiff averred that the third and fourth defendants accepted the transfer of the property from the second defendant even though they had reasons to know that the Power of Attorney was false ...
- G [61] However, when it came to adducing evidence, the plaintiff had not at all brought home the case of negligence against the third and fourth defendants. There was no attempt whatsoever by the plaintiff to affix any knowledge of the defective Power of Attorney on the part of the third and fourth defendants. On the contrary, the third and fourth defendants had proven their defence as *bona fide* purchasers of the property for value without notice. In our judgment, in the circumstances of this case, damages as a relief in a claim *in personam* founded in tort were only available if the plaintiff had proven that the third and fourth defendants had wronged him in a way as can be seen in the case of *Datuk Jagindar Singh & Ors v. Tara Rajaratnam (supra)*
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- I [59] Based on the above, we are of the view that as the first and second defendants' claim against the seventh defendant is based on the tort of negligence, they would be entitled for damages or indemnity if they can prove the seventh defendant had wronged them. However, having said that, we find that the first and second defendants cannot simply allege that they have been wronged by the seventh defendant and therefore they must be paid. We agree with the learned High Court Judge as well as the learned ALA that

the first and second defendants need to first prove their losses. It is trite law that parties who claim for damages must prove actual losses suffered. It is also trite law that the purpose of indemnity is to keep the indemnified party harmless against the specified loss. So the amount awarded must correspond to the amount of actual loss.

[60] This court in *Tan Ah Chio & Ors v. Lua Kim Soon & Ors* [2014] 1 LNS 1004; [2015] 1 MLJ 334 had held, *inter alia*, a party claiming damages must prove actual losses suffered and that the losses suffered were caused by the opposing party's breach. It is not enough for them to say that they have lost without proving the loss.

[61] In this instant appeal, the learned High Court Judge had found that the first and second defendants had failed to show evidence of any payment of the purchase price made. Even the so-called payment made was only for the sum of RM325,000 and was made payable not to the third defendant but to the fourth defendant, a director of the third defendant. This was admitted by the first defendant himself in his evidence which can be seen at p. 769 of the record of appeal, part B & C, vol 2(4). They therefore had failed to show that they have paid the full purchase price of RM2,000,000.

[62] We find no reason to depart from Her Ladyship's findings which were carefully explained in paras. [24] and [25] of her grounds of judgment. We find the first and second defendants have failed to show the specified losses suffered by them. As such our answer to this issue is in the negative.

Conclusions

[63] Based on the above, we unanimously dismiss both Appeal 326 and Appeal 359 with costs. The order of the High Court dated 11 August 2017 is hereby affirmed.

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